Service of the within and receipt of a copy thereof is hereby admitted this ..... day of December, A.D. 1975.

IN THE

Supreme Court of the United States

October Term, 1975
No. 75-714

MYRON F. HEILIG,

Petitioner,

vs.

HONORABLE CARL J. CHRISTENSEN, Chief Judge, Eighth Judicial District Court of the State of Nevada, in and for the County of Clark; ROBERT WEISS; and JACK SHULMAN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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OPINION BELOW.

The opinion of the Nevada Supreme Court is reported at 91 Nev. ....., Adv.Op. 38, 532 P.2d 267 (1975).

JURISDICTION.

The Court's jurisdiction has been invoked by petitioner Heilig under 28 U.S.C. 1257(3), apparently in the belief he has been denied due process of law by the Nevada Supreme Court's discretionary determination to not grant a writ of mandamus in his favor to overturn a state district court decision against him from which he did not appeal.

There is not a federal question involved here, even if Heilig is correct that the Nevada Supreme Court

"misapplied" the "law of mandamus" (which respondents do not concede). Petition for Certiorari at 12. There is an adequate state ground upon which the Nevada Supreme Court's decision can be supported. For these reasons respondents believe that this case does not invoke this Court's jurisdiction and, therefore, clearly does not warrant review.

QUESTIONS PRESENTED.

1. Whether a civil litigant who fails to exercise his right to appeal a judgment against him has been denied due process of law if an appellate court thereafter declines to vacate the judgment by a writ of mandamus.
2. Whether one who is dissatisfied with an arbitrator's award has been deprived of any federal right by due confirmation of the award pursuant to state law.

STATUTES INVOLVED.

1. Nevada Revised Statutes, Chapter 38, Section 205, in 2 Nevada Revised Statutes 1312 (1973).
2. Nevada Revised Statutes, Chapter 34, Sections 150-310, in 2 Nevada Revised Statutes 1177-80 (1973).

(Hereafter citations to Nevada statutes will be "NRS" followed by the appropriate subdivision.)

STATEMENT OF THE CASE.

This statement is based on the proceedings in the district court, not all of which have been reported. Most of what follows was stated in the Statement of Facts in Respondents Weiss and Shulman's Brief

filed in the Nevada Supreme Court, which was not commented on or objected to by Heilig. Respondents have not been favored with an index to the record before this Court so they are unable to cite where in the record the brief may be found.

The exhibits cited in this statement were, except where a citation to the record appears, admitted into evidence in unreported hearings on February 22 and September 20, 1973. All of the exhibits were either stipulated into evidence or received without objection. Because the exhibits are bound separately but are not a paginated portion of the record, citation of them will be "Exhibit ...." without further reference.

The partnership property involved in this case is an apartment complex comprised of 113 individual parcels of real property in Clark County, Nevada. Exhibit 18. The parties to this proceeding (other than Judge Christensen) entered into a partnership agreement which provided for the ownership and operation of the property as an apartment rental business. Exhibit E; R. 238. At the time of acquiring the property, each partner executed 113 promissory notes for the entire purchase price of the parcels; each of them is jointly and severally liable on the notes, which are secured by deeds of trust on file in the Clark County Recorder's office. R. 306.

In 1970 the partnership entered into a lease of the partnership property with Kogelschatz Korp. R. 251. The lease proved not only unprofitable but detrimental; the lessee did not pay the rental specified in the lease or the mortgage payments, did not keep the apartments occupied or properly maintained, and otherwise let the property deteriorate or be destroyed

by some of the tenants and vandals. R. 293-96, 305-09. The lease was not recorded and therefore was not a cloud on title, a fact which was accepted by the district court. R. 154, 181-87.

Default on the lease by Kogelschatz seriously impaired the partnership's capital and ability to pay installments on the indebtedness outstanding against the property. Weiss was appointed by Heilig and Shulman to go to Las Vegas and attempt to work out matters with Kogelschatz and preserve the lease. R. 70-71. If the lease could not be maintained, Weiss was directed to take all steps necessary to preserve the property. The lender which held the deeds of trust was threatening foreclosure unless the property was repaired and maintained in accordance with the provisions of the deeds governing such matters.

Weiss was unable to work out a solution with Kogelschatz and commenced suit against it to obtain possession of the property. R. 251; Exhibit R. Kogelschatz thereafter abandoned it, and to save the property from further destruction and the partnership from insolvency, and to avoid personal liability on the joint and several notes executed by the partners, Weiss, without prior consideration or arrangement, gave up his home and law practice in New York in July, 1971, remained in Clark County with his family, and took over the operation of the partnership business because both Heilig and Shulman had failed and refused to cooperate with him to work out an acceptable alternative or in any manner share the burden of operating the business with him. At the time Weiss took over the property it was losing $20,000 per month and continued to do so for some time thereafter.

After moving to Clark County, Weiss, with no other means of financing available, advanced substantial sums of his own and money borrowed by him personally to save the partnership from bankruptcy. (From July, 1971, to February 22, 1973, the property lost approximately $375,000.) He later filed the complaint in this case to obtain reimbursement for the money loaned by him to the partnership. The action was stayed at the request of Heilig, by order of the district court, pending arbitration of the dispute in New York City. R. 101-02. Heilig did not do anything after obtaining the stay to institute arbitration proceedings; that was accomplished by Weiss.

The arbitration hearings took place over a period of eight months, and they were conducted by the American Arbitration Association pursuant to its rules. R. 239. Weiss made four trips to New York City during 1972 to participate in the hearings. In furtherance of the arbitration, the arbitrator came to Clark County on two occasions to view the partnership property. All of the parties attended the arbitration either in person or through an attorney, except for the closing provided for in the arbitrator's award, which was not attended by either Heilig or his attorney, although they had proper notice of it. Both Heilig and Weiss are attorneys licensed to practice in New York. Shulman and Heilig were represented by an attorney at every hearing before the arbitrator. R. 182-83.

During the arbitration, pursuant to the agreement of the parties, and at the direction of the arbitrator, Weiss resided on and managed the partnership property with his wife. Weiss continued to advance the money necessary to continue the business. Exhibit 5. The only contribution made by Heilig to the partnership,

during this or any other time, was at the direction of two of the four interim awards entered by the arbitrator. R. 254; Exhibit 7, ¶¶1-4. The orders were entered to provide funds to operate the property and avoid foreclosure; Heilig stopped payment of his check for his share under the third order; he ignored the fourth. R. 254; Exhibit 4 (not admitted, but authenticity not questioned).

On August 16, 1972, during arbitration, the parties —including Heilig and his attorney—entered into a stipulation, which was read into the record by the arbitrator, regarding a number of partnership matters. Exhibit 5. Among other things, the stipulation provided for "a final accounting and settlement" and "division of the [partnership] property," and a "closing" to accomplish these matters after issuance of the arbitrator's award. Exhibit 5, ¶5. The award provided for the arbitrator to retain jurisdiction, pursuant to the agreement of the parties, for 30 days following the closing to settle any outstanding items. Exhibit 7, ¶12.

The stipulation also sets forth the parties' express agreement that each of them would "execute and deliver power of attorney" to the arbitrator "to make, execute and deliver deeds and other instruments that may be necessary to effectuate a division of [the partnership] property in accordance with his decision for the division of the property," which power of attorney was to be used by the arbitrator "in the event any of the parties are not available" at the closing. Exhibit 5, ¶10. (Just prior to the closing, Heilig attempted to repudiate this portion of the stipulation.)

The arbitration culminated in an award, dated December 28, 1972; Weiss thereafter moved for modification of it in accordance with the applicable state law and the rules of the American Arbitration Association. After receiving Heilig's response to the request for modification, the arbitrator amended the award by a Disposition of Request for Modification of Award on February 8, 1973. R. 182; Exhibits 7 and 9, respectively. (Unless it is necessary to distinguish between the two, both will be referred to as "the award.") The award directed dissolution of the partnership, division of the partnership property, and, among other things, an award in favor of Weiss against each of the two other partners for their proportionate share of the loans made by him to the partnership. The award also scheduled the time and place for winding up and terminating the partnership's affairs and adjusting the accounts of the partners (the "closing" referred to in the stipulation, Exhibit 5, ¶5). The time was February 22, 1973, and the place was the office of the partnership in Clark County, Nevada. Exhibit 9, ¶F.

Following modification of the award, Weiss filed his Motion to Confirm Award of Arbitrator, as Modified, on February 15, 1973. R. 77-83. Several hearings were conducted on the motion in an attempt to obtain confirmation of the award prior to the closing. The judge assigned to the case, respondent Christensen, was not available, and the initial hearings on the motion were conducted by the Honorable Thomas J. O'Donnell. Heilig's then attorney, John Peter Lee, appeared in court in response to the motion to contest the validity of the proceedings, alleging that notice of the motion had not been properly served on Heilig, even though Heilig had written a letter to Weiss telling him "that all communications of whatever sort or de-

scription you may wish to send me including but not limited to service of process are to be directed to me in care of John Peter Lee, Esq. . . ." (Exhibit 1), which had been done.

The court overruled these objections on February 22, 1973, in the presence of Heilig's attorney and set a hearing on the motion at a later time. Heilig was given until March 9, 1973, to file objections to confirmation, which he did by a "Reply to Motion to Confirm and Counterclaim." All parties to the arbitration or their attorneys and the arbitrator were in court before Judge O'Donnell on the morning of February 22; all, including the judge, knew that the closing was scheduled for the afternoon of that day. No one even suggested a stay of the closing. Petition for Certiorari, Appendix G, at 32a; Petitioner's Supplemental Brief, Appendix at iii, filed in Nevada Supreme Court.

Heilig deliberately chose not to attend or participate in it in any manner. R. 183. As previously mentioned he attempted to "revoke" the arbitrator's authority to execute any document on his behalf which would be necessary to complete the closing in his absence. Exhibit B. The attempt to revoke was specifically rejected by the arbitrator. Exhibit 22. Both Shulman and Weiss, together with Shulman's attorney, Nathan T. Isquith, and the arbitrator, Philip Adelman, attended the closing, as called for in the award, as it applied to them, and exchanged deeds to portions of the partnership property. R. 183. Thereafter the arbitrator prepared and sent a copy of the accounting rendered at the closing to Heilig and invited him to object to any portion of it and offered him the opportunity of a hearing on his objections. R. 183; Exhibit 13. Heilig

did nothing in response to the arbitrator's invitation. R. 183-84. (The arbitrator's jurisdiction to so act was conferred by agreement of the parties, which was incorporated in the award. Exhibit 7, ¶12.)

On May 7, 1973, the arbitrator, not having received any response from Heilig about the accounting, rendered his Final Award and Closing Statement in which he set out the transactions which took place at the closing, and restated the intent and some of the dispositive provisions of his award. R. 184; Exhibit 14.

Following delivery of the Closing Statement to Heilig, extensive hearings were conducted in the district court on the motion to confirm the award. Such resulted in the Order Confirming Arbitrator's Award, entered by the court on January 28, 1974. R. 181-185. During the course of the district court hearings, Heilig took inconsistent positions; for example, that the arbitration was still pending, although he himself had filed a Notice of Award of Arbitrator (during the time the modification of it was pending) on February 6, 1973.

ARGUMENT.

Every issue raised in the Petition was raised in the Nevada Supreme Court and in the district court. Each one was decided against Heilig after a thorough hearing; none raises a federal question here, as will be demonstrated.

I

The Disputed Closing on February 22, 1973.

The closing, as pointed out above, p. 7, was agreed to by Heilig; its purpose was to implement the arbitrator's award. Because Heilig refused to participate in it, confirmation and enforcement of its terms by court order was necessary.

Specific performance of arbitration awards is available on the same terms and conditions as it is for other awards, Levy v. Superior Court, 15 Cal.2d 692, 104 P.2d 770 (1940), and a court of equity is especially disposed to decree specific performance of awards involving title to land. 5 Am. Jur. 2d *Arbitration & Awards* §158 (1962); 81 C.J.S. *Specific Performance* §73 (1953); *see also* the early case of Jones v. Boston Mill Corp., 21 Mass. (4 Pick) 507 (1827), cited in Annot., 70 A.L.R.2d at 1062 (1960). Furthermore, such enforcement of the award may be granted in the same action in which confirmation of the award is secured. Kerr v. Nelson, 7 Cal.2d 85, 59 P.2d 821 (1936). Weiss and Shulman were clearly entitled to have the arbitrator's award enforced, as well as confirmed, to place uncontested title to two-thirds of the partnership property in them.

There is no question that the parties to an arbitration may agree on further action to be taken by the arbitrator after delivery of the award and thereby enlarge

his powers. *See* Jannis v. Ellis, 149 Cal.App.2d 751, 308 P.2d 750 (1957). Similarly, it is settled that

> Ordinarily, an award, otherwise valid, can be in no way affected or abrogated by any act or attempted repudiation of one of the parties alone. . . .

6 C.J.S. *Arbitration* §106 (1975); *see also* Dugan v. Phillips, 77 Cal.App. 268, 246 P. 566 (1926); Keith Adams & Assocs., Inc. v. Edwards, 3 Wash.App. 623, 477 P.2d 36 (1970). Furthermore, if putting the award into effect is prevented by the refusal of one party to abide by its terms, that is sufficient to justify enforcement of the award by the court, regardless of whether the party seeking enforcement has performed his part of it or not. 6 C.J.S. *Arbitration* §130 (1975). A party simply may not prevent the rendition or carrying out of a binding award by his own deliberate default. Spring Cotton Mills v. Buster Boy Suit Co., 275 App.Div. 196, 88 N.Y.S.2d 295 (Sup.Ct. 1949), *aff'd* 300 N.Y. 586, 89 N.E. 2d 877 (1949). Even an innocent procedural default, which is not a statutory ground for vacating an award, does not entitle a party to relief by the court from the effect of such a default. Central Gen. Hosp. v. Local 1115 Nursing Home, 61 Misc.2d 447, 305 N.Y.S. 2d 948 (Sup. Ct. 1969); *see also* Campanelli v. Conservas Altamira, S.A., 86 Nev. 838, 477 P.2d 870 (1970).

Thus Heilig's attempted repudiation of the stipulation and his refusal to participate in the closing had no effect on the right of Weiss and Shulman to obtain confirmation and enforcement of the award by the district court. *See* Transnational Ins. Co. v. Simmons, 19 Ariz.App. 354, 507 P.2d 693 (1973).

It has also been held, at least in the absence of fraud, *cf.* Nelson v. Reinhart, 41 Nev. 69, 167 P. 690 (1917), that when a stipulation has been entered into and filed with a tribunal, one of the parties will not be allowed to withdraw from it without the consent of the others, except by leave of the tribunal upon a showing of good cause. Smith v. Owens, 397 P.2d 673 (Okla. 1963). Furthermore, the Nevada Supreme Court has held that a party cannot avoid the effect of a stipulation because such is adverse to him. Second Baptist Church v. Mount Zion Baptist Church, 86 Nev. 164, 466 P.2d 212 (1970); *see* Webster v. Webster, 216 Cal. 485, 14 P.2d 522 (1932); Goltl v. Cummings, 152 Colo. 57, 380 P.2d 566 (1963); and the lengthy discussion in Estate of Meister, 72 Misc.2d 459, 339 N.Y.S.2d 575 (Sur.Ct. 1972), in which it is emphasized that when there is not a dispute as to terms, a stipulation cannot be avoided because of "second thoughts occasioned by information available at the time of the agreement but not then considered significant." 339 N.Y.S.2d at 579.

Thus the arbitrator was correct in specifically rejecting Heilig's attempt to withdraw from the stipulation in this case and revoke the authority given to the arbitrator to execute deeds on Heilig's behalf. *See* Staklinsky v. Pyramid Electric Co., 6 N.Y.2d 159, 160 N.E.2d 78 (1959), in which the New York Court of Appeals upheld an arbitrator's grant of specific performance when it had been authorized by the parties, even though it was doubtful that a court could have given the relief under the same circumstances. Consequently, the district court in this case was correct in confirming the arbitrator's award and in specifically ordering Heilig to execute a power of attorney or

proper deeds to Shulman and Weiss dated as of February 22, 1973. Heilig refused to do either, and the court properly executed deeds for him. Nev. Rule Civ. Proc. 70, 2 NRS at 894.

II
The February 22, 1973, Hearing and the Alleged "Fraud" in Connection With It.

This "issue" hardly deserves comment; it is either the product of ignorance or a deliberate misrepresentation. Heilig alleges that either Weiss or his attorney should have told respondent Judge Christensen about the order of Judge O'Donnell on February 22, 1973, which set a date for Heilig to file objections to confirmation of the award. Apparently Heilig believes the order in question and its significance have been concealed by Weiss and his attorney. This is nonsense for two reasons: (1) the order has nothing to do with the closing, and (2) it was obtained by Heilig's attorney who was in court at the time it was announced. Petition for Certiorari at 8. It is elementary that notice to Heilig's attorney was notice to Heilig. Noah v. Metzker, 85 Nev. 57, 450 P.2d 141 (1969). There was therefore no failure to disclose anything unknown to Heilig. If he thought the February 22 order was significant, he should have brought it to the attention of Judge Christensen.

III
The Alleged Discrepancy Between the District Court's Oral Announcement and Its Written Order.

This was the subject of two motions in the district court; both were denied. Petition for Certiorari at 10. In this regard it should be pointed out that there is a misstatement of fact on page 10 of the Petition:

There was not a tender of any sum of money to the district court in connection with Heilig's attempt to amend the court's findings, nor was there a tender at any other time during the proceedings in either the district court or the Nevada Supreme Court.

Whatever variance there is between the district court's oral announcement and its written order is irrelevant. Under Nevada law it is the executed written order which prevails, even if it contradicts a preceding oral order. Fox v. Fox, 84 Nev. 368, 441 P.2d 678 (1968); Musso v. Triplett, 78 Nev. 355, 372 P.2d 687 (1962); Bowers v. Edwards, 79 Nev. 384, 385 P.2d 783 (1963). Moreover, the oral statement clearly exceeded the court's authority under the Uniform Arbitration Act, NRS Chapter 38, a fact which Judge Christensen presumably recognized and which explains the variance in his written order.

For these reasons the district court was not obligated to reform its written order of January 28, 1974, and the Nevada Supreme Court was not *required* to issue mandamus to compel such action by the lower court. This result is not altered by the cases cited by Heilig, for they are either inapposite on their facts or involve instances in which the Nevada Supreme Court, in the exercise of its discretion, found mandamus justified.

IV

The Extraordinary Writ Proceedings in the Nevada Supreme Court.

What Heilig is really concerned about is the fact that the district court's order confirming the arbitrator's award has become final; he let the time run for appealing it to the Nevada Supreme Court without filing a notice of appeal. NRS 38.205(1)(c) allows an appeal

to be taken from "an order confirming or denying confirmation of [an arbitrator's] award." Rather than appeal Heilig sought extraordinary relief by an original proceeding in the Nevada Supreme Court to obtain a writ of mandamus, prohibition, or certiorari. None of the writs was available to him because he had an adequate remedy at law at the time he applied for them. Heilig v. District Court, 91 Nev. ...., Adv.Op. 38, 532 P.2d 267 (1975); *see* State ex rel Newitt v. District Court, 61 Nev. 164, 121 P.2d 242 (1942). It is incontestable under Nevada law that mandamus is not proper even if a possible legal remedy is not "as 'plain, speedy, and adequate' a remedy as is provided by mandamus, and that an action for money damages 'would not be equally as convenient, complete, beneficial and effective' as a writ of mandamus." Washoe Co. v. Reno, 77 Nev. 152, 155, 360 P.2d 602, 603 (1961).

Thus the real issue in this case has been properly disposed of on an independent state ground, which is dispositive of Heilig's petition here, Farson v. Bird, 248 U.S. 268 (1919), and it must be dismissed. *Id.; see* Copperweld Steel Co. v. Industrial Comm'n, 324 U.S. 780 (1945). Heilig is entitled to nothing more than what he already has obtained—a hearing in the court of his choice in a proceeding, the form of which was selected by him, in an attempt to review the district court's order confirming the arbitrator's award. That he was unsuccessful in his attempt does not raise the denial of his petition by the Nevada Supreme Court to the level of a denial of due process which should be considered by this Court. Morgan v. Hines, 113 F.2d 849 (D.C.Cir. 1940); Simmons v. Superior Court, 52 Cal.2d 373, 341 P.2d 13 (1959).

Nor is there any merit in Heilig's claim that Weiss was not entitled to file the Notice of Entry of Judgment [*sic;* should read "Notice of Entry of Order Confirming Arbitrator's Award"], discussed at page 21 of the Petition for Certiorari, or that the Nevada Supreme Court "did nothing to quash it." Filing of the notice was not a "proceeding" which was "pending" in the district court and thus subject to the Court's stay—it was merely formal notice to Heilig and his counsel that the district court had entered its order confirming the award on January 28, 1974. All he needed to do was file a simple, one page Notice of Appeal within the next 30 days. Nev. Rules App. Proc. 3, 4, and Form 1 appended thereto; 2 NRS at 974-976, 1005; Jumbo Mining Co. v. District Court, 28 Nev. 253, 81 P. 153 (1905). It is therefore beyond cavil that the notice of entry of the order confirming the arbitrator's award was validly filed. If Heilig wished to contest it, he should have filed a notice of appeal and proceeded in the Nevada Supreme Court under NRS 38.205(1)(c).

The district court's judgments of March 5, 1975, divesting Heilig of title to 75 of the 113 parcels of real property which were awarded to Weiss and Shulman by the award are valid; Heilig, as pointed out above, refused to execute deeds pursuant to the award and the district court's order to do so. As indicated above, the court had the authority to act if he did not under Rule 70 of the Nevada Rules of Civil Procedure. 2 NRS at 894. Heilig was not deprived of anything to which he was entitled by these judgments, because Weiss and Shulman received only what they had been awarded more than two years earlier by the arbitrator, whose authority and

award Heilig has spent three years in an attempt to repudiate.

Heilig has had a full opportunity—if not multiple opportunities—to raise every issue discussed in his Petition for Certiorari before either or both the district court and the Nevada Supreme Court. He does not deserve further consideration by this Court because his claims have been resolved against him under state law which has accorded him all of the process to which he is due, if not more.

CONCLUSION.

Heilig's alleged "loss" of property is not a loss at all; he has not been deprived of any property awarded to him by either the arbitrator or the district court. All that has happened is that Weiss and Shulman have obtained title to two-thirds of the former partnership property in accordance with the intention and award of the arbitrator. With regard to the one-third which would have been distributed to Heilig if he had attended the closing and performed, its status and title were not affected or dealt with by either the district court or the Nevada Supreme Court. Such remains to be adjudicated. The fact that Heilig did not attend the closing to implement the award is legally meaningless insofar as Weiss and Shulman are concerned; they were there, they performed, and they are entitled to whatever the award conferred on them by virtue of their performance.

This case does not involve a denial of due process or a federal question of general interest, nor does it involve any issue the resolution of which would have any national significance. It will affect few, if

any, other than the litigants in this case; the decisions of the district court and the Nevada Supreme Court are based on a set of facts which is unlikely to occur with any frequency in the future, if at all. All Heilig is saying is that he is dissatisfied with the result of the arbitration he requested, and he failed to take a timely appeal from the district court's order confirming the arbitrator's award. His failure does not amount to a denial of due process by the Nevada Supreme Court. Avens v. Wright, 320 F.Supp. 677, 684 (W.D. Va. 1970). This would be true even if the Nevada Supreme Court erroneously denied Heilig's petition, because "the Constitution of the United States does not guarantee that the decision of state courts shall be free from error [citations omitted]." Worcester County Trust Co. v. Riley, 302 U.S. 292, 299 (1937).

Heilig's avoidance of the closing was a calculated decision to avoid two things: (1) payment of just debts to Weiss and Shulman, and (2) taking any property in his name for which he would then have to assume financial responsibility. At that time all of the property was losing money; it was not generating income sufficient to pay expenses and service the debt outstanding against it. He preferred to wait, to force Weiss, his responsible former partner, to continue operating the property and cover its losses pending an upturn in revenues. If such did not occur, he would simply do as he had done—nothing—and let Weiss foot the bill.

If Heilig really believed the arbitrator's award was faulty, and if he really intended to do something other than delay and snarl the confirmation hearings, he could have easily sought to change, modify, or correct the award pursuant to statute. NRS 38.115, 38.155.

He did nothing of the sort. Now that things have changed, after Weiss has rescued the property with his money, effort, and talent, Heilig wants this Court to give him, at Weiss's expense, the one-third of it he refused on February 22, 1973, by endorsing his deliberate and unlawful repudiation of the award he was instrumental in procuring. This is not the stuff out of which due process cases arise, and this Court should have no part of it.

The Petition for Certiorari should be denied.

Respectfully submitted,

STEVE MORRIS,
Attorney for Respondents.